

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GETTY TERMINALS CORP.	:	DETERMINATION
for a Hearing with Regard to a Bond Required	:	
under Section 283 of Article 12-A of the Tax	:	
Law.	:	

Petitioner, Getty Terminals Corp., 125 Jericho Turnpike, Jericho, New York 11753, filed a petition for a hearing with regard to a bond required under section 283 of Article 12-A of the Tax Law (File No. 804745).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Building #9, W. A. Harriman State Office Building Campus, Albany, New York, on February 26, 1988 at 10:00 A.M., with all briefs to be submitted by June 7, 1988. Petitioner appeared by Dornbush, Mensch, Mandelstam & Silverman (Richard J. Schaeffer, Esq., of counsel). The Audit Division appeared by William F. Collins, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division properly required petitioner, as a condition of maintaining its registration as a motor fuel distributor, to file a surety bond in the amount of \$8,200,000.00.

FINDINGS OF FACT

1. Petitioner, Getty Terminals Corp. ("Getty Terminals"), is a wholly-owned subsidiary of Getty Petroleum Corp. ("Getty Petroleum"). Getty Terminals imports oil into New York and sells it to distributors or Getty Petroleum, and also operates terminals.

2. On April 30, 1987, the Audit Division advised petitioner that it was proposing that security be set in the amount of \$15,744,000.00. The amount of the security sought was based on the excess of petitioner's potential motor fuel and sales tax liability for a six-month period over petitioner's net worth (that is, \$22,724,192.00 minus \$6,980,000.00).

3. On or about May 8, 1987, petitioner filed a motor fuel bond in the amount of \$50,000.00. In September 1987, the Audit Division returned petitioner's \$50,000.00 bond and reiterated its position that security in the amount of \$15,744,000.00 was required.

4. At the time of the hearing, the Audit Division reduced the amount of security being sought on the basis of more recent information which disclosed that petitioner's potential six-month motor fuel and sales tax liability was \$19,817,824.00 and petitioner's net worth was \$10,859,000.00. The Audit Division determined that security in the amount of \$9,000,000.00 was required representing the approximate excess of petitioner's potential tax liability over its net worth.

5. After the hearing, the Audit Division again reduced the amount of security being sought based on the availability of still more recent information. The information available at the time of the hearing shows that petitioner has current assets of \$50,437,000.00 and current liabilities of \$40,057,000.00 resulting in a current ratio of 1.26 to 1. On the basis of an examination of petitioner's taxable receipts for the months of May 1987 through October 1987, the Audit Division concluded that petitioner's potential tax liability for a six-month period was \$19,381,417.00. The Audit Division concluded that security in the amount of \$8,200,000.00 was required. As in the prior determinations, the amount of the security sought represents the approximate remainder resulting from subtracting petitioner's net worth of \$11,203,000.00 from petitioner's potential six-month tax liability.

6. For Federal income tax purposes, petitioner's corporate income tax return is consolidated with the return of Getty Petroleum. On September 10, 1987, the Audit Division gave Getty Petroleum tentative permission to file a combined report for corporation franchise tax purposes with, among others, petitioner.

7. During the period December 1986 through November 1987, petitioner's total motor fuel tax liability, including New York City tax, was \$23,631,774.08. During the same period of time, petitioner had credits and made payments of \$25,303,569.49, resulting in a net overpayment of \$1,671,795.41 and an average monthly overpayment of \$139,316.00. The reason for the overpayments was that petitioner paid tax on the basis of conservative estimates of its tax liability. The overpayments were then claimed as credits on the following month's return.

8. During the months of December 1986 through November 1987, petitioner incurred sales tax liability of \$16,385,525.66 and made payments of \$17,231,951.17. Consequently, during this period petitioner made a total overpayment of \$864,425.51 and an average monthly overpayment of \$72,035.46. The overpayments of sales tax were the result of petitioner's making payments on the basis of a conservative estimate of its sales tax liability. At a later time, petitioner amended its returns to reflect the actual amount due.

9. The consolidated balance sheet of Getty Petroleum and its subsidiaries for the year ended January 31, 1987 lists current assets of \$105,670,000.00 and current liabilities of \$84,356,000.00 resulting in a current ratio of 1.25 to 1. Utilizing the six-month period ending October 1987, Getty Petroleum's consolidated net worth exceeds Getty Terminals' potential

motor fuel and sales tax liability by \$50,070,790.00.

10. The consolidated balance sheet of Getty Petroleum and its subsidiaries for the year ended January 31, 1988 reports current assets in the amount of \$133,368,000.00 and current liabilities of \$100,228,000.00 resulting in a current ratio of 1.33 to 1. For the year ended January 31, 1988, Getty Petroleum and its subsidiaries had a net worth of \$82,008,000.00.

11. Petitioner has entered into an agreement with Getty Petroleum and its subsidiaries whereby the signatories have agreed to assume, as co-obligors, the obligations of Getty Terminals to collect and pay over motor fuel tax and sales and use taxes for a two-year period of time commencing February 24, 1988. In the agreement, the obligors stipulated, among other things:

"that in any action against the Obligors to require payment of the Taxes, the Obligors shall succeed to any defenses, counterclaims, rights of set-off or similar rights which [Getty] Terminals may have...."

SUMMARY OF PETITIONER'S POSITION

12. Petitioner maintains that only the minimum bond should be required in view of the assets of Getty Petroleum which are available to satisfy Getty Terminals' obligation by operation of Tax Law § 289-b(2) and the agreement to be obligated for Getty Terminals' taxes. Petitioner also argues that consideration should be given to its record of meeting its tax obligations.

CONCLUSIONS OF LAW

A. That Tax Law § 283(3) provides, in part:

"The tax commission shall require a distributor to file with the department of taxation and finance a bond issued by a surety company approved by the superintendent of insurance as to solvency and responsibility and authorized to transact business in this state or other security acceptable to the tax commission, in such amount as the tax commission may fix, in an amount determined in accordance with rules and regulations prescribed by it, to secure the payment of any sums due from such distributor (i) pursuant to this article and (ii) pursuant to articles twenty-eight and twenty-nine of this chapter with respect to sales and uses of motor fuel. The tax commission shall require that such a bond or other security be filed before a distributor is registered, and the amount thereof may be increased at any time when in its judgment the same is necessary as a protection to the revenues under this article and articles twenty-eight and twenty-nine of this chapter."

B. That by section 18 of chapter 282 of the Laws of 1986, the foregoing function of the Tax Commission was transferred to the Commissioner of Taxation and Finance.

C. That 20 NYCRR 414.2(b) provides that in all cases a distributor is required to file a bond which is adequate to meet certain requirements. One such requirement is set forth in 20 NYCRR 414.2(b)(2) which provides¹:

"Generally, if the ratio of current assets to current liabilities is at least one to one and the net worth is less than the estimated six-month maximum potential tax liability, a bond is required for the difference between the net worth and the estimated six-month maximum potential tax liability."

In this instance, the Audit Division followed 20 NYCRR former 414.2(b)(2) to determine the amount of security and set the amount of the bond as the difference between petitioner's net worth and petitioner's estimated six-month maximum potential tax liability. Petitioner has not presented any evidence or argument warranting a departure from this regulation.

D. That petitioner has argued that since Getty Petroleum owns 100 percent of Getty Terminals, Getty Petroleum is liable for all tax payments due from Getty Terminals. Petitioner maintains that, as a result, the assets of Getty Petroleum should be considered in evaluating the need for security. This argument is premised upon Tax Law § 289-b(2) which provides:

"Any officer, director, shareholder or employee of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship, who as such officer, director, shareholder or employee is under a duty to act for such corporation, partnership or proprietorship in complying with any requirement of this article, and any member of a partnership, which fails to pay the taxes imposed by or pursuant to this article, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax not paid, plus penalties and interest computed pursuant to subdivision one of this section as if such person were a distributor. If the tax commission determines that such failure was due to reasonable cause and not due to willful neglect, it shall remit all or part of such penalty imposed under this subdivision. Such penalty shall be determined, assessed, collected and paid in the same manner as the taxes imposed by this article and shall be disposed of as hereinafter provided with

¹It is recognized that new regulations were adopted on March 8, 1988. The new pertinent regulation now provides:

"Generally, if an applicant's or a distributor's current ratio is at least one-to-one and 80 percent of the net worth is less than the six-month maximum potential tax liability, a bond will be required for the difference between 80 percent of the net worth and the six-month maximum potential tax liability." (20 NYCRR 411.2[b][3][i].)

respect to moneys derived from the tax."

E. That the foregoing argument is without merit. Tax Law § 1131(1), in conjunction with Tax Law § 1133, imposes a similar liability with respect to sales and use taxes as Tax Law § 289-b(2) imposes with respect to motor fuel taxes. It is well established that the liability imposed by Tax Law §§ 1131(1) and 1133 is dependent upon a showing that there is a duty to act on behalf of the party that has not remitted the taxes owing (e.g.____, *Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437). Thus, it is likely that a similar showing of duty will be required before liability would be imposed under Tax Law § 289-b(2).² Assuming arguendo that Getty Petroleum is liable for the taxes due from Getty Terminals pursuant to Tax Law § 289-b(2), there is nothing to show that the corporations could not change the nature of their operations thus eliminating any duty in the future. Consequently, while Getty Petroleum may be liable for the taxes due from Getty Terminals, this liability is only problematic and does not relieve Getty Terminals from having to meet the relevant financial criteria on its own.

F. That petitioner's argument that the agreement by Getty Petroleum and its subsidiaries to act as an obligor for the taxes due warrants the conclusion that only the minimum bond need be posted is without merit. When a bond is posted, security is available which may be seized without first resorting to legal proceedings. Under this agreement, however, an extended legal process could be required before recovery would occur. Thus, the agreement does not give the same security and it may not be viewed as a substitute for a bond .

G. That in reliance upon *Matter of A. Tarracone, Inc.* (State Tax Commn., September 21, 1984) and *Matter of Simon Oil Company, Inc.* (State Tax Commn., August 12, 1983), petitioner has argued that the Audit Division did not give sufficient consideration to petitioner's filing record. This argument is unpersuasive. It is acknowledged that in each of the foregoing cases the filing record was considered. It is also undisputed that, on the record presented, petitioner's filing record is unblemished. However, in both of the cases relied upon, the filing record was considered in conjunction with the taxpayer's overall financial position. In neither instance did the taxpayer rely on the financial position of another corporation. In view of the personal nature of a registration (see____ 20 NYCRR 414.5[a]) and petitioner's legal status as an independent entity, consideration of Getty Petroleum's assets would be improper. Getty Petroleum chose the form of petitioner's business operation and must bear the consequences of this choice (see____ *Matter of Ormsby Haulers, Inc. v. Tully*, 72 AD2d 845).

²It is recognized that Tax Law § 1131(1) does not impose liability on shareholders per se. However, this difference does not appear to be of any consequence.

H. That the petition of Getty Terminals Corp. is denied and the bond requirement in the amount of \$8,200,000.00 imposed by the Audit Division is sustained.

DATED: Albany, New York
June 23, 1988

/s/
ADMINISTRATIVE LAW JUDGE